Parliament of Romania
Chamber of Deputies

Bucharest, 18 May 2011

Courtesy English translation

Reasoned Opinion

concerning the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121

Considering the Lisbon Treaty, especially Articles 5 and 12 TEU and Protocols 1 and 2 annexed to the Treaty,

Considering the Romanian Constitution, republished, especially Article 148,

Considering the Decision of the Chamber of Deputies no. 11/2011,

Considering the Reasoned Opinion delivered by the Standing Committee on Budget, Finance, and Banks on its session of 10 May 2011,

Considering the Government's position, expressed by the Department on European Affairs,

The Chamber of Deputies, in performing its power to control the compliance with the principles of subsidiarity and proportionality of the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 112, tabled by the European Commission on 16 March 2011, has adopted the present **Reasoned Opinion**:

Description and objectives

1. Through the measures proposed, first of all the creation of a Common Consolidated Corporate Tax Base, the proposal for a Directive aims to improve the economic efficiency in distributing the productive capital throughout the EU by reducing the fiscal distortions within the investment decisions, and thus by increasing the cross-border investments.

The legal basis relied on by the European Commission is Article 115 TFEU, according to which the Council, acting unanimously in accordance with a special legislative procedure, may issue directives for approximation of legislative, regulations and administrative provisions as directly affect the establishment or functioning of the internal market.

The evaluation of the **compliance with the principle of subsidiarity** has been done by verifying the two criteria in the Article 5 TEU:

- The **criterion on the insufficiency of the national action** (the objectives of the intended actions cannot be properly achieved by the Member States) and

- The **criterion of the added value on the EU level** (the objectives of the intended action could be better achieved at the EU level, given its scale and effects).

Also, an evaluation of the **consequences of the directive enforcement over the fiscal independence of the Member States** has been performed, as well as an assessment of the opportunity **to choose the legal basis**.

The criterion of the insufficiency of the national action

2. The European Commission substantiates the criterion of the insufficiency of the national action, by observing that the 27 different national systems of corporate income taxation impede the proper functioning of the single market, and that the individual action taken by each one of the Member States cannot provide for a solution to this issue.

The European Commission's duty when tabling the mentioned proposal for a directive had also to be fulfilled by a thorough evaluation of the current legal framework in place. This assessment was supposed to take into consideration, as an alternative, too, how a better coordination and cooperation between Member States (and their tax administrations) could prevent the double taxation and other fiscal cross-border obstacles, considering the current EU legal framework on the cooperation and exchange of information between the Member States in the field of direct taxation.

The criterion of the added value on the EU level

3. The criterion of the added value is not sustained by the straight and quantifiable highlight of the advantages given by the action taken at the EU level:

- The impact analysis performed by the European Commission reveals the insignificant or even nonexistent effects of the introduction of the Common Consolidated Corporate Tax Base (the CORTAX general equilibrium model) over the EU as a whole;
- The formula applied for the apportionment of the consolidated tax base uses three criteria – labour, assets and sales – which may be considered either unbalanced, or non-equivalent, or unfair. In this way, the proposed formula would have a negative impact on the revenues of some Member States, including Romania;
- In the explanatory memorandum, the European Commission specifies that the effects on the size and the distribution of the tax bases of the companies in the EU are not an objective of the proposal. Consequently, no other objectives have been defined concerning the distribution or neutrality of the revenues for the Member States. In addition, the European Commission confines itself to specify that *„[…] no conclusions should be drawn on the final impact on overall tax revenues of Member States, as those will ultimately depend on national policy choices with regard to possible adaptations of the mix of different tax instruments or applied tax rates"* (emphasis added). These national policy options will, in fact, amount to adjustment reactions of the Member States in order to preserve their tax revenue size and are liable to occur one after another, each adjustment imposing other response reaction. The application of the directive may induce uncertainty and unpredictability, negatively affecting the investments;
- The positive effects on the transnational corporations have two sources:
    - The diminishing of the compliance costs which represent efficiency net profits (earnings) for the economic actors as a whole (companies, states, house holdings);

- o Payment of some smaller taxes and thus attainment of larger net profits for the companies, given the possibilities **to consolidate the losses** and **to internalize the prices** by eliminating the transnational transaction prices according to the arm's length principle. These positive effects are not, whatsoever, the result of certain efficiency based net earnings, but of **an effective transfer of public funds**, which are under the stress of the fiscal consolidation, **into the profit accounts of the companies**. The evaluation of this transfer, which would suppose less public goods, over the overall welfare has not being performed yet.

- The transposition in the internal law and the enforcement of the directive are subject to produce **supplemental (significant) financial and administrative costs, from the point of view of the national tax authorities,** inflicted by the simultaneous existence of two different fiscal systems meant to manage the same tax, and by the necessity to consolidate the administrative infrastructure in the framework of the national authorities cooperation.

- In order to compensate the inconclusive results offered by the CORTAX model to the EU overall welfare, the European Commission underlines the long term dynamic benefits to continue the integration within the internal market, that will produce the replacement of the national investments with the cross-border ones, on one hand, and the increase of the attractiveness of the EU as a whole to multinational investors, on the other hand. It is just a supposition without any solid proof in its favour. Moreover, the assertion of the European Commission concerning the dynamic effects is based on the alleged benefits of an increased competitiveness of the companies induced by the internal market integration. While the competitiveness of the companies is a prerequisite, it does not necessarily reverberate in the increased competitiveness of the economies as a whole. The positive correlation between competitiveness of the companies and the overall wealth of nations can be achieved only on certain conditions. Therefore, a detailed justification of these allegations would be necessary, an action that the European Commission should undertake.

Effects on the tax sovereignty of the Member States

4. The European Commission assumes that, by retaining the control over the tax rates, the Member States do maintain their tax sovereignty, therefore the principle of subsidiarity being complied with.

The tax revenues of the State depend both on the nominal value of the tax rate and the tax basis. The tax sovereignty in the field of the corporate tax requires retaining of the control over both the tax basis and the tax rate. Limiting the possibilities of employing those controls would amount to a loss of tax sovereignty.

The application of the common consolidated tax base shall entail both direct effects on the tax base of each Member State, and indirect effects on the tax rate, as the Member States will have to adjust them in order to compensate the effects of altering the tax base on the tax revenues.

Therefore, the enforcement of the directive would amount to a significant limitation of the Members States tax independence.

Accordingly, the reasoning submitted by the European Commission is conflicting and insufficiently justified.

Legal basis

5. There is a contradiction between the requirement of removing the tax obstacles in the single market and the Member States tax sovereignty. The question is how far can go the reliance on the single market functioning (Article 115 TFEU) in limiting the competences of the Member States in respect of the corporate taxes. Up until now, the Union legislative action in the field of direct taxation was limited, pertaining specific issues. The present proposal aims at a significant extension of the Union action in the field of corporate taxes. Accordingly, the necessity for a legislative action at the Union level has to be substantiated by employing objective criteria. Moreover, the European Commission has not convincingly substantiated the way in which the choice made at the level of each Member State on its own tax rules has to be limited as mentioned in the proposal.

In the framework of the European Union, the concept of subsidiarity has a dynamic (or ambivalent) nature, as it is mentioned under the point 3 of the Amsterdam protocol: *"Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows [Union] action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified"* (emphasis added).

Consequently, the concept of subsidiarity would allow the expansion of the Union action, in the limits of its competences. According to Article 5 TEU, under the principle of conferral, the Union shall act only within the limits of the competences conferred upon by the Member States in the Treaties. That being so, concerning the proposal for a directive, in the context of choosing the Article 115 TFEU as legal basis, the European Commission has the duty to substantiate both in qualitative and quantitative terms the subsidiarity in order to expand the EU action.

*

*   *

For the abovementioned reasons, the Standing Bureau of the Chamber of Deputies has decided to deliver a reasoned opinion that **the proposal for a directive does not comply with the principle of subsidiarity**.

This reasoned opinion shall be sent to the Presidents of the European Parliament, the European Council, and the European Commission.

Speaker,

Roberta Alma Anastase